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No. 00-61

In The
Supreme Court of the United States

T.E.G./L.V.I. ENVIRONMENTAL SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE OBJECTIONABLE FLYER WAS NOT "MERE PROPAGANDA WHICH EMPLOYEES COULD EVALUATE FOR THEMSELVES"

In their opposition to the petition for writ of certiorari, the National Labor Relations Board primarily argues that the Union's misleading flyer did not constitute objectionable conduct under Board precedent because it is "merely propaganda which the employees can evaluate themselves." [*See* Brief in Opposition, hereinafter "Opp.," p. 3, citing *SDC Investments*, 274 NLRB 556, 557 (1985)]. In further arguing that the flyer was not an "official document," the Board concedes that the flyer was distributed on plain paper that contained no letterhead, seal or other logo. (Opp. 4). But the Board fails to explain how immigrant employees from Latin America would know such a document was from the union without such identifying information, and there is no way to reasonably conclude that they did. In this regard, the reference in the flyer to the "T.E.G./L.V.I. Environmental Workers Organizing Committee" is not the same as to either of the petitioning unions (i.e., Asbestos Laborers Local 882 or Heat & Frost Insulators Local 5). Moreover, it is overly presumptuous to conclude that the Petitioner's employees would have automatically considered such a "Committee" as being the same as either of the petitioning unions – particularly if they had not been involved in the organizing drive and had never heard of such an "organizing committee" before receiving the flyer.[1] The

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[1] The fact that the flyer listed the "organizing committee's" phone number and not the Board's is also immaterial, primarily

flyer was therefore not "clearly identified as [a document] distributed by the Union," as the Board contends. (*See* Opp. 4).

The Board's contention that "there is no basis for concluding here that immigrant employees should be considered less capable than other employees of evaluating campaign propaganda for what it is" is also untenable and contrary to the reasoning of *Columbia Tanning Corp.*, 238 NLRB 899, 900 (1978). (*See* Opp. 5, n. 5). This is indeed a dangerous assumption to make given the mass influx of immigrant workers from Latin American countries over the last decade, where government-sponsored and nationalized labor unions are rampant and such workers are thus inherently more likely to believe statements of the kind made by the Unions in their illegal flyer. (*See* U.S. Dept. of Labor, Bureau of International Labor Affairs, Foreign Labor Trade Report, 1991-2, confirming that 85% of Mexico's organized workers are represented by unions which are members of the Congress of Labor, which is affiliated with the PRI – the dominant political party in that country).

The Board's seminal contention in this respect is that the Union's misstatement as to the Board's neutrality "was not presented in a manner that precluded the employees from recognizing the partisan campaign propaganda for what it is." (*See* Opp. 9). But the flyer was in fact akin to the kind of "forged documents" which would

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because there was no evidence presented that any employees ever called the number or that anyone who ever answered calls to the number identified themselves as representatives of either of the petitioning unions.

"render the voters unable to recognize [it] properly for what [it was]" under *Midland National Life Insurance*, 263 NLRB 127, 133 (1982). In this respect, the Union's flyers contained outright statements of fact to relatively uneducated asbestos removal workers, who were largely ignorant of the Board's election processes, that the federal government actually favored one party to the election over the other.[2]

Finally, the Board argues that due to the timing of the flyer the Employer had an opportunity to respond to it. (Opp. 11). However, as the Board itself admits, there was no evidence presented on this issue, or as to whether the Employer even received the flyer before the election occurred. Moreover, this argument was never made by the Union in either the agency or enforcement proceedings. The Union should therefore not be able to obtain the advantage of an inference drawn from the complete absence of evidence in the record, which it easily could

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[2] In determining the merits of this Petition, the Court should take judicial notice of the proper translation of the second offensive statement contained in the flyer, which was that "The National Labor Relations Board of the United States of America ordered that an election should take place between the worker [sic] of T.E.G./L.V.I. Environmental Services Inc., *so that they could finally vote for their union.*" (Emphasis supplied). The Hearing Officer failed to accept this translation, finding instead that the second paragraph of the flyer read that "An election was set so the employees could decide whether or not they wished to be represented by the Union." In doing so, he improperly translated the word "decidirse" to mean "to decide for themselves" rather than "decide" or "to make up one's mind," and "su" to mean "the" and not "their" or "your." (*See* Cassell's Spanish Dictionary, MacMillan Publishing Co., 1978).

have presented had it called the Employer's witnesses to testify as to when they actually received a copy of the flyer in question.

II.

THE *VAN DORN* EXCEPTION TO THE *MIDLAND* RULE SHOULD BE APPLIED HERE, AND OPERATE TO INVALIDATE THE RESULTS OF THE ELECTION

The Board concedes that a conflict between the Circuits does in fact exist regarding whether an exception to the *Midland* doctrine should be recognized, but merely relies on the District of Columbia Circuit's unexplained conclusion that the outcome of the case "would be no different" regardless of whether the *Midland* standard or the "*Van Dorn* exception" were applied. (Opp. 10). This merely constitutes circular reasoning, to the effect that no conflict has actually been presented for review because the appellate court said so. The facts of this case instead cry out for the application of the *Van Dorn* exception to this case, because the misrepresentation by the Union was "so pervasive" that the Petitioner's employees would be unable to separate truth from untruth and their "right to a free and fair choice would be affected." *See Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984). This result can reasonably and naturally be inferred from the express language of the objectionable flyer, consistent with Board Member Hurtgen's analysis.

This case indeed represents a vehicle by which the Court could determine whether the *Midland* rule should be overturned outright, on the ground that there is no logical reason – other than judicial economies to the

Board – for overturning elections based on evidence of "forged documents" (which an opposing party can also presumably respond to), and blatantly misleading flyers such as the one involved in the instant case. Petitioner submits that there is in fact no difference between such conduct and the use of forged documents, which if anything may be less deceptive and more easily correctable by an opposing party than the kind of untruths propagated by the Union in the instant case.

To this end, the Board offers no response whatsoever to Petitioner's citation to *Mount Carmel Center*, 306 NLRB 1060 (1992), cited at page 13, n. 5 of its Petition, in which the Board invalidated an election based on an employer's use of an altered union financial form under circumstances in which the employer won the election by over 100 votes. Quite simply, it makes no sense to permit the Board to continue to overturn elections in those circumstances, but not in those presented by the instant case, on the grounds that the Union's conduct here did not involve the use of "forged documents." As Board Members Fenning and Jenkins stated in their dissent in *Midland*, it is illogical to assume that only forgeries will "render the voters unable to recognize the propaganda for what it is." *Ibid.*, 263 NLRB at 134. Those Board Members in fact castigated the majority for creating

> an irrebuttable presumption that employees can recognize all misrepresentations, however opaque and deceptive, except forgeries. Employees' free choice in elections, the only reason we run elections, must necessarily be inhibited, distorted, and frustrated by this new rule. To the majority, this is less important than the freedom to engage in lies, trickery, and

> fraud. Under the new [*Midland*] rule, important election issues will be ignored in favor of irresponsible charges and deceit. Under *Hollywood Ceramics*, the Board did not attempt to sanitize elections completely but only to keep the campaign propaganda within reasonable bounds. Those bounds have now disappeared. Why?

Id.

Almost twenty years later, the question remains unanswered, and presents this Court with a golden opportunity to do away with this unfair and irrational rule and replace it with one which enables employers and unions alike to successfully challenge the results of Board-conducted elections when the kind of deceit and trickery involved in this case are manifest.

III.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: September 19, 2000

Respectfully submitted,
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